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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: TSO-0595

This Decision concerns the eligibility of (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹ For the reasons set forth below, I conclude that the individual's security clearance should not be restored at this time.

I. BACKGROUND

The individual is employed by a Department of Energy (DOE) contractor and was issued a security clearance in connection with that employment. On July 12, 2007, the individual was administered a drug test in connection with an offer of employment from another DOE contractor. The results of that test were positive for Cannabinoids (metabolites of Marijuana) and Propoxyphene, which is an ingredient in the prescription pain killer "Darvocet." Because this information cast into doubt the individual's continued eligibility for access authorization, the local security office summoned him for an interview with a personnel security specialist in August 2007. The local security office determined that this Personnel Security Interview (PSI) did not resolve these doubts, and they informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The local security office forwarded this request to the Office of Hearings and Appeals, and I was appointed the Hearing Officer. The DOE introduced 11 exhibits into the record of this proceeding and the individual presented the testimony of two witnesses in addition to testifying himself.

¹An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

II. THE NOTIFICATION LETTER

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraphs (f), (k) and (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Paragraph (f) defines as derogatory information indicating that the individual "has deliberately misrepresented, falsified, or omitted significant information from . . . a Personnel Security Interview [or] written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization" With regard to this paragraph, the Letter states that during the August 2007 PSI, the individual initially stated that he had tested positive for Propoxyphene because, on two successive nights the weekend before his July 12, 2007, positive drug test, he had taken one Darvocet left over from an old prescription that was written for him by his dentist. He further stated that he took the medication because he had injured his back working in his garden. Upon further questioning, the individual said that his "mother also takes Darvocet," and "I have taken some of hers before . . . so I might have taken more than that." He then estimated that he had taken "not more than six or eight" during the first 10 days of July 2007, and never more than one pill at a time. PSI at 17. However, later during the PSI, he said that "there might have been a few times I might have taken two Darvocets." PSI at 22.

The Notification Letter also alleges that the individual made false or misleading statements about his marijuana use. Specifically, the Letter states that he initially explained during the PSI that he tested positive because of "second-hand" exposure to marijuana smoke at the home of a friend who suffers from Acquired Immune Deficiency Syndrome (AIDS). He added that he went to this friend's house the day before his drug test and he denied that he had ever smoked marijuana or that the friend had smoked marijuana in his presence. PSI at 18-20. He later stated that the "second-hand" exposure had been his only exposure to marijuana. PSI at 23. However, when specifically asked whether, "in the month of July, [he had] ever put a marijuana cigarette to [his] lips and inhale[d] marijuana," the individual eventually replied that he had taken "two [or] three hits" of that substance with his friend. PSI at 28. He said that this usage occurred "around the 4th of July" PSI at 26. When asked by the Personnel Security Specialist whether he realized that he was being dishonest about his marijuana usage, the individual responded in the affirmative. PSI at 32.

The Letter also cites a telephone conversation between the local security office and the Medical Review Officer (MRO) of the company that administered the drug test. In that conversation, the MRO was asked if the individual's statements during the PSI concerning his illegal drug usage are consistent with the test results. He replied that he would "challenge" the accuracy of the individual's statement that he took only two or three "hits" of marijuana on July 4, 2007, which was eight days before the test was administered. The MRO said the test results indicated either that the individual smoked marijuana within "five or six" days of the test, or that he smoked considerably more than two or three "hits." With regard to propoxyphene, the MRO said that the test levels indicated that the individual had taken at least one or two pills within one or two days of the test, and that any usage of this substance in the absence of a legally-obtained prescription "was a concern." DOE Exhibit 9.

This information also forms the basis for the DOE's invocation of paragraph (k). That paragraph pertains to information indicating that the individual has "sold, transferred, possessed, used, or experimented with a . . . substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, . . . etc.) except as prescribed or administered by a physician" or otherwise authorized by federal law. Specifically, the Letter cites the positive drug test, the individual's statements about his illegal drug usage, and the conversation between the local security office and the MRO.

Pursuant to paragraph (l), information is derogatory if it indicates that the individual "has engaged in any unusual conduct or is subject to any circumstances which tend to show that [he] is not honest, reliable, or trustworthy; or which furnishes reason to believe that [he] may be subject to pressure, coercion, exploitation or duress which may cause [him] to act contrary to the best interests of the national security. Such conduct include[s], but [is] not limited to, criminal behavior" 10 C.F.R. § 710.8(l). As support for this paragraph, the Letter refers to the individual's statements during the PSI indicating that

1. He knew that smoking marijuana and taking pain medication originally prescribed for his mother were both illegal. PSI at 21, 30.

2. He wasn't concerned about the marijuana that he smoked on July 4th showing up on his July 12th drug test because he "didn't really think it was that big of a deal." PSI at 27.

3. He made false or misleading statements to three people concerning the reasons for the positive test for marijuana, telling an employee of the company that administered the test that he had attended a party where the drug had been used, and telling two co-workers that he had been exposed to second-hand smoke at his friend's house. PSI at 32-33.

4. He knew that smoking marijuana was inconsistent with his continued eligibility for a security clearance, and he admitted signing a security acknowledgment form on March 7, 2006, which clearly provides that marijuana usage and unauthorized prescription drug usage are both inconsistent with continued access authorization. PSI at 34-35.

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting the individual a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding his conduct; the frequency and recency of the conduct; the age and maturity of the

individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. FINDINGS OF FACT AND ANALYSIS

A. The DOE’s Security Concerns

At the hearing, the individual generally did not contest the allegations set forth in the Notification Letter concerning his use of marijuana and Darvocet or his false or misleading statements about that use during the PSI.² This derogatory information adequately justifies the DOE’s invocation of paragraphs (f), (k) and (l), and raises significant security concerns. Conduct involving lack of candor or dishonesty can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Use of an illegal drug or misuse of a prescription drug can also raise questions about an individual’s reliability and trustworthiness, both because such usage may impair judgement and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines E and H.*

B. Mitigating Evidence

Through his own testimony and that of a former supervisor and a co-worker, the individual attempted to show that he has ceased his illegal drug usage, and that he is an honest and reliable person who can be entrusted with a security clearance. The former supervisor and the co-worker both testified that the individual is a direct and honest person, and that they had no knowledge of his ever having used illegal drugs. Hearing Transcript (Tr.) at 11, 12, 22, 23. In addition, the former supervisor said that the individual was an outstanding employee who was skilled and ambitious. Tr. at 14.

The individual testified that, with the exception of his usage of marijuana on July 4, 2007, he has never used illegal drugs. Tr. at 31, 46. He then explained the circumstances that led up to this usage. He said that prior to July 4, he began going to the house of a friend who has AIDS and has lost his eyesight, to read to him. During some of his visits, he noticed the odor of marijuana in the air. His

²The one exception is that, despite the statement of the MRO, the individual continued to maintain that he took only two-to-four hits of marijuana on July 4, 2007.

friend told him that he smoked the drug for pain relief and because it helped to improve his appetite, and he allegedly asked the individual on several occasions if he wanted to try it. The individual repeatedly refused. However, during a visit on July 4, 2007, the friend asked again if the individual wished to smoke marijuana. The two had previously discussed the individual's responsibilities of caring for his ailing mother and sister, and the friend suggested that the individual use marijuana to cope with the stress. The individual decided to use the drug, and took between two and four hits of a marijuana cigarette that he shared with his friend. Tr. at 36-37. At that time, he testified, he was not really thinking about how this usage would affect his clearance, but on his way home, "it really hit home," and the individual started to feel "like [he] was having a panic attack." Tr. at 37. He indicated that he smoked marijuana to relieve the stress associated with caring for his mother and sister, and because he had become somewhat desensitized to the illegal nature of the drug by associating with his friend. He stated he had never used illegal drugs before this episode, that his usage was "really stupid" and "something [he] regret[s] with every fiber of [his] being," and that he did not intend to illegally use drugs in the future. Tr. at 31, 39, 47. He subsequently asked the friend to not smoke marijuana in his presence. Tr. at 41. He visited the friend "a couple of times between that episode" and the time he took the drug test. Tr. at 40. During these visits, he said, the individual did not smoke marijuana, but there was "smoke in the room when [he] got there." Tr. at 41.

With regard to the individual's unauthorized use of Darvocet, he indicated that this occurred from the beginning of 2007 through the summer of that year. Tr. at 47. He would take one pill, perhaps "a couple of times a week," after over-exerting himself working in his yard or around his house. Tr. at 32. On "a couple" of occasions, he took more than one Darvocet at a time. Tr. at 33. He suffers from bone spurs in his heels, and he would take the pills to relieve pain in his feet and back. Tr. at 31, 32. At the time, he said, he was trying to get "the best bang for [his] buck" by using Darvocet, which, he observed, worked much better than an over-the-counter pain medication. Tr. at 32. However, he added that "Understanding now that taking prescription medication that belongs to someone else is not legal, I have a much different perspective about that now." *Id.* Other than his mother's Darvocet, the individual testified that he has never used drugs that were prescribed for another person. Tr. at 35.

The individual also testified about his lack of candor during the PSI. He indicated that he provided false and misleading information because he was embarrassed "with [his] performance and with the lapse in [his] character and judgment." Tr. at 49. He added that going through this administrative review process has been a "corrective action" that has made him a more honest and reliable person because he now knows what the consequences of dishonesty can be. Tr. at 50.

C. Analysis

After considering this testimony and the record in this matter as a whole, I conclude that the individual has not produced sufficient evidence of mitigating factors to allay the DOE's security concerns under paragraphs (f), (k) and (l).

1. Paragraphs (f) and (l)

As described above, the individual attempted to demonstrate at the hearing that the false or misleading statements that he made during the PSI were aberrations, and that this administrative proceeding has given him a new appreciation of the importance of candor in security-related matters and of abstaining from illegal drug usage. However, the record indicates that no significant changes in his attitude have occurred. With regard to candor, the Notification Letter alleges, and the individual does not deny, that he made misleading statements about his marijuana usage to three people shortly after his positive test, telling them that it resulted from “second-hand” exposure at a party or at his friend’s house. At the hearing, it became evident that the individual has continued to be less than fully truthful on this issue when each of his witnesses testified that the individual informed them that he tested positive for marijuana because of exposure to “second-hand” smoke, and not because of his personal usage of that substance.³ Tr. at 11, 15, 22, 23. At the hearing, the individual indicated that he was not fully honest during the PSI because of embarrassment over his illegal drug usage. Tr. at 49. This could also explain his deliberate omission of significant facts from the accounts of his drug usage that he gave to the three people referred to in the Notification Letter and to his two witnesses. However, the Part 710 regulations do not permit the individual to withhold relevant information during a PSI or other security-related inquiry on the grounds that revealing the information might prove embarrassing. Given his continuing failure to be completely honest about his illegal drug usage, I am not at all confident that the individual can be relied on to reveal potentially embarrassing, but important, information to DOE security in the future.

Furthermore, as previously mentioned, the individual testified that he has a different perspective on his usage of his mother’s Darvocet because he now understands that such usage is illegal. Tr. at 32. However, contrary to the plain implication of this statement, he later indicated that he knew that using drugs prescribed to another person was illegal at the time that he was regularly taking pain medication prescribed to his mother during the spring and summer of 2007. Tr. at 45. I see no evidence of any significant changes in the individual’s attitude that would lead me to believe that a recurrence of this untruthfulness is unlikely. Nor am I persuaded, in view of the individual’s inconsistent explanations regarding his unlawful conduct, that he has abated the concerns about his reliability and trustworthiness. I therefore find that the DOE’s security concerns under paragraphs (f) and (l) remain unrebutted.

2. Paragraph (k)

I reach a similar conclusion regarding the DOE’s security concerns under paragraph (k). The individual attempted to address those concerns by asserting that the only time that he has ever used marijuana was on July 4, 2007, when he took two-to-four “hits” with his friend, and that he has now ceased taking medications that were not prescribed to him.

Although the individual presented the testimony of two co-workers in support of these claims, I find there to be insufficient evidence in the record to allow me to conclude that the concerns have been mitigated. The co-workers’ testimony is of limited usefulness because both had little or no contact

³ These two witnesses were not among the three people mentioned in the Notification Letter.

with the individual outside of their work environment. Tr. at 10, 21, 26. Consequently, they could shed no light on the individual's private life.

The only other evidence supporting these assertions is the individual's own testimony, which I find to be lacking in credibility. As an initial matter, if the individual's claims are to be believed, the only instance of marijuana usage in his entire life just happened to occur eight days before the individual was subjected to a drug test related to an offer of employment. While this sequence of events is possible, given the individual's history of making false or misleading statements about his drug usage, I am unwilling to accept such a coincidence in the absence of substantial corroborating evidence. No such evidence has been presented here.

Moreover, the individual's statement during the PSI that he took only two or three "hits" of marijuana and his testimony at the hearing that he took only two-to-four "hits" of marijuana on July 4, 2007, eight days before the drug test, are both contradicted by documentary evidence submitted by the DOE.⁴ That documentation included a monograph entitled "Drug Retention Times," written by the Center for Human Reliability Studies, Oak Ridge Institute for Science and Education, for the DOE's Office of Security Policy. According to this monograph, "infrequent" marijuana use, defined as occurring once or twice over a given weekend, can be detected by the administration of a drug test within one-to-five days of the last usage.⁵ DOE Exhibit 11, monograph at 4. The monograph went on to state that even regular users of marijuana may escape detection if the test is given as few as five days after the most recent usage. *Id.* at 5. Given these findings, which were not rebutted by the individual, I do not find credible his unsupported testimony that the individual's only marijuana usage consisted of two-to-four hits taken on July 4, 2007. The fact that marijuana was detected eight days after this purported usage suggests either that the usage was heavier than stated or took place closer to the test date than stated. In either event, the individual's assertions do not withstand

⁴ The Notification Letter also cites a telephone conversation between the local security office and the MRO of the company that administered the drug test, during which the MRO opined that the test results are inconsistent with the individual's statement during the PSI that he took only two or three "hits" of marijuana eight days before the July 12, 2007, drug test. The MRO did not testify at the hearing, according to DOE Counsel, because he "is not under contract to the DOE," and the local security office was unable to make the necessary financial arrangements to get him to testify. Tr. at 6-7. As a consequence, I was unable to ascertain the MRO's qualifications as an expert to render the opinion set forth in the Notification Letter, and he was unavailable for cross-examination by the individual. In addition, none of the circumstances set forth in the Part 710 regulations, that would permit me to consider a written or oral statement adverse to the individual rendered by someone who is not available for cross-examination, exist in this case. *See* 10 C.F.R. § 710.26(l). I therefore did not consider the MRO's opinion in reaching a decision concerning the individual's eligibility for access authorization.

⁵ This assumes a "cutoff" level (i.e., the lowest concentration of a particular drug or its resulting metabolites that will cause a person to be identified as using that substance) of 50 nanograms (ng) per milliliter (ml) for the initial screening and 15 ngs per ml for the confirmatory analysis, performed by using a gas chromatograph-mass spectrometry system. These cutoff levels and this methodology were used in the individual's drug test. *See* DOE Exhibit 7.

scrutiny. For the forgoing reasons, I conclude that the individual has not established any factors that would mitigate the DOE's security concerns under paragraph (k).

V. CONCLUSION

The individual has not produced sufficient evidence of mitigating factors to allay the DOE's security concerns under paragraphs (f), (k) and (l). I therefore conclude that he has not demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, the individual's security clearance should not be restored at this time. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Hearing Officer
Office of Hearings and Appeals

Date: June 26, 2008

